Terrorism and Criminal Justice
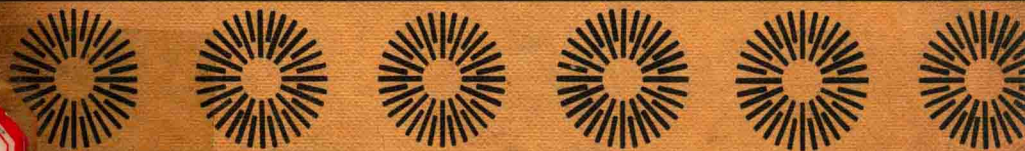
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Terrorism and Criminal Justice

An International Perspective

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Foreword

History bears witness to the fact that few if any nations have come into being or stayed alive without experiencing the phenomenon that is generally referred to today as terrorism. Indeed, the founders of many nations were in a state of rebellion against the then-existing order, were decried by that order as rebels, traitors, or terrorists, and were celebrated as heroes after the success of their usually patriotic missions. History also has a process of healing wounds and turning rebels into conformists and conservators of new orders. As we look at the world today, we find societies in a state of fermentation side by side with societies eager to preserve the product of their own fermentation. It is for this reason that it has become difficult to find universal agreement on how to deal with this phenomenon called "terrorism." Yet, with the ever-increasing, mass-destructive potential of weaponry at the disposition of terrorists or freedom fighters, the search for a solution has become a matter of the greatest urgency, for the threat to a tiny political entity now may threaten the peace and security of all humankind. The sympathy for the high goals and aspirations of those struggling for national independence, freedom from suppression or alien occupation, and recognition of their ethnic, racial or religious identity, cannot lead to toleration of actual or potential mass destruction on the part of those who either seek or repress these goals and aspirations. The fight for high ideals becomes heinous criminality when it wantonly destroys the values committed to the protection of all humankind in international instruments governing war and peace and securing the human rights of all human beings. The number of universally agreed upon international instruments identifying and protecting these rights is growing. Nevertheless, also growing are the attacks on these rights, and the number of tombstones marking the graves of totally uninvolved victims—men, women and children.

A few lessons seem to have been learned already. Escalation of repression leads to escalation of pressure for attainment of ideals. That escalation increases victimization of the innocent. On the other hand, removal of the underlying grievances eliminates the need to continue to fight for their removal. But the struggle of any particular group may be a long one. What can the international community do—what must it do—until that stage of bliss is reached, in order to protect the innocent and to preserve the basic human rights of the involved while the struggle lasts? Who is to decide whether any particular struggle is a legitimate striving for ideals established by the community of nations as represented by the United Nations, or whether it is a criminal enterprise in opposition to these ideals? While the phenomenon of so-called terrorism—a preferred term, at least on the international scene, might be "transnational violence"—has been with us throughout history, we have yet to learn from that history; we have yet to establish the principles by which we can deal with it.

For that reason, an effort like the present one, to study multinational experiences and to arrive at generally valid conclusions, can only be welcomed by the international community. Few would deceive themselves into believing that the problem is thereby solved. This is but a beginning, albeit an absolutely necessary first step. It does not solve the problem, but it may alert the international community to the issue and one hopes it will stimulate the scholarly community into earnest efforts appropriate to the contemporary crisis in order to preserve universally agreed upon values.

The scholars who contributed to this volume are not political protagonists. The sponsoring organization, the International Centre for Comparative Criminology, enjoys universal respect in the world by reason of the intellectual neutrality with which it has approached all issues to which it has addressed itself. This is the reason why this volume is so significant. But by sponsoring this volume, the Centre also has assumed an obligation that may take some time to complete. Through continued neutral inquiry that is detached from partisan politics, through research, inquiry, and publications, and in the atmosphere of calm that a think-tank can provide better than a political forum, the Centre must continue the search for a solution to the problem that today is derisively called "terrorism." The goal is worth pursuing: a world as free as humanly possible from terror, whether exercised under the guise of governmental authority, whether in pursuit of high ideals, or whether from base and criminal motives.

Gerhard O.W. Mueller, Chief
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Note: This foreword does not purport to reflect the official views of the United Nations.

Preface

Historically, all crimes were "political," the separation of the legislative, executive, and judicial powers being a major achievement of modern statehood. One can say that nineteenth- and twentieth-century social evolution resulted in the "depoliticization" of the judicial system. This is perhaps a reflection of the growing consensus, within the liberal democratic state, concerning the essential fairness of the political machinery and the relative independence of the judicial order from it. Social democratic ideals stressing the right for a more effective equality had spread through the body politic without altering, however, the basic incentives to the exercise of individual responsibilities. The responsiveness of the holders of political power to the aspirations of the general public for material well-being and civil liberties tended to rule out violent means as a viable method for challenging the established rules of the social order.

Terrorism challenges the political system and, in so doing, represents a basic "regression" in the psychoanalytical sense. Why this regression? Why did we enter, around the mid-sixties, a period of turmoil that recalls the turbulent periods of prerevolutionary Russia, late Renaissance Italy, or the mid-nineteenth century's revolutionary years that culminated in the Paris Commune? It seems to us that we are witnessing every twenty to thirty years or so, an exacerbation of the latent opposition of world views, or *weltanschauungen.* The latest manifestations of this are the Vietnam War-induced moral crisis in the United States, the awakening of a revolutionary spirit in Paris in the spring of 1968, and the generational confrontation in Germany during the mid-sixties. All these events had in common the weakening of the value system that ultimately justifies the rule of law. The very notion of the Res Publica lost its compelling characteristics, the nature of which allowed, in the past, the smooth functioning of conflicting class, social, age, and sexual interest groups. The coherence of the system will be significantly reduced, given the growing influence of radically opposed contra-values and the militancy of those adhering to them within the same system.

We are now entering a phase of social evolution that produces a type of society in our Western democracies closely resembling the nonintegrated ideal type; opposing conducts, each having their own moral justification, are pitted against each other within the confines of a single society. Several countercultures are vying for the loyalties of the membership of a given society, and as a consequence, the sense of "civic virtues" as well as "public interest" is rapidly vanishing. And, therefore, social conflicts will exhibit tendencies to degenerate into civil wars. As Clausewitz used to say: "War is the continuation of diplomacy via other means." The same can be suggested for the use of violent means in the solving of economic and social conflicts of interest.

The contemporary criminal justice system has evolved to deal more and

more with persons and less and less with acts. The problems arising from this evolution are reflected in the present crisis in "corrections": The treatment-oriented sanction related to the person does not seem to have been very effective. The terrorist as an offender looks to be the least eligible candidate for rehabilitation. This gives rise to the renaissance of the "preventive" model close to the classical school of penal law. Is this a particular development related to the "political crime" or is it a general tendency engulfing the whole criminal justice system?

Just let us recall briefly three models of crime control. The first is based on the *deterrent* effect of the sentence. The penal threat predominates, and the severity of punishment is the central piece of the strategy. The *correctional* model implies a basic trust in the ability of man to rehabilitate himself, to proceed toward a re-adaptation of his behavior to commonly accepted goals. This re-adaptation is effected by the purposeful manipulation of legal, psychological, and environmental variables. The *preventive* model stresses the consequences of an increased incapacitation of the potential offenders by reducing significantly the opportunities and capabilities to commit proscribed acts. There seems to be an increasing public resignation to the inconveniences or the price to be paid for the very expensive means required by the preventive model. The control of subways, airports, maybe even railway stations, high-rise buildings, and banks, indicates this tendency. Of course, there is, in practice, a large overlap in the effects of these three models. The deterrence model still remains rather effective for the large mass of the "silent majority"; the medical and correctional model is surely helpful with offenders demonstrating psycho- and sociopathological characteristics; the preventive model may play a significant role for the so-called "normal" or "professional" criminal.

To maintain a sense of proportion in talking about terrorism however, we should not forget the tremendous amount of violence and terror resulting from the shortcomings of the criminal justice system and its operations within our so-called "civilized" societies, not to mention wars, and so forth. Just in thinking of the twenty-five victims of the Lod airport shooting, compared to the thousands of victims of the recent Lebanese civil war, we could ask ourselves why the former made a deeper impact on world opinion than did the latter. We do not offer any ready explanation.

The frequency of terrorist acts in the recent past allows us to evaluate an increasing body of data pertaining to the effectiveness of the philosophies, strategies, and technologies used and tested by various agencies. One of the tasks of comparative criminology is to find out about particular achievements and generate a critical reflection bearing on theories and practices of crime prevention and control.

What do we want to achieve? We hope to summarize and critically evaluate the present knowledge on the subject and submit it to the international scholarly community as well as to the general public for their attention. We want to

convey our concern, as criminologists or specialists in criminal policy, to have the international community look at the contemporary forms and aspects of one of the oldest of crimes: the contest for the exercise of power by violent individuals or minorities. To a large extent, this marks the end of a narrow, parochial concept of corrections and law enforcement and places them in the more appropriate and broader perspective of the political sciences.

While one sees an increasing flow of literature on terrorism as evidenced by the almost weekly arrival of new books and articles, be they technical, legal, journalistic, or fictional, the specificity of this volume lies in the perspective from which the problem is analyzed—that is, the perspective of criminal justice. By criminal justice, we mean the institutionalized form it takes in pluralistic, liberal democracies. Through their activities, the terrorists aim at demonstrating the illegitimacy, inefficacy, and inappropriateness of the present judicial and legal fabric of society. The success or failure of such an enterprise depends primarily on the responses that the criminal justice system will devise to counter these attacks. The legal framework of Western societies is characterized by complex and delicate checks and balances between the rights of individuals and the public interest, the chemistry of which can be upset both by the terrorists' actions and by the system's hasty reactions.

For the purposes of a fruitful analysis, we accept the basic premise of the criminal justice model; namely, the criminal justice system is the best available tool to guarantee equity and fairness in regulating the interaction between individual freedom and social requirements. One cannot deny that major imperfections and even inequities exist in this system and that these have to be dealt with directly. In fact, only by doing so can we gain a true understanding of the unique challenge that political terrorism poses to the democratic tradition.

The second unique characteristic of the present work lies in its comparative approach. The views and tentative conclusions of the different chapters are based on careful evaluation and confrontation of various national experiences with sometimes highly contrasting social and political histories as far as terrorism is concerned. This is especially relevant in a time when terrorism knows no boundary.

The text is organized in such a way as to bring out the unique aspects of our analysis. The first part starts from a broad perspective from which the interaction between the terrorist challenge and the criminal justice response is seen to be a reciprocal process that can be viewed as a holistic system. It then narrows the perspective and focuses sequentially on the various components of the criminal justice system and how each one is affected by the terrorist challenge. This sequential analysis culminates in a step up to the international level, which, though not in actual practice embodied in the official structure of the criminal justice system, constitutes the forefront of the struggle.

The second part deals specifically with actual national experiences in which detailed problems or cases are discussed. Thus, the overall plan of the book is to

move from the broad perspective to the narrow one in order to provide the reader with several frames of reference from which to study the problem.

This book derives from a conference entitled "The Impact of Terrorism and Skyjacking on the Operations of the Criminal Justice System," held in February 1976 in Rochester, Michigan. The first three chapters in Part I, based primarily on a working paper written by R.D. Crelinsten for the conference, have been revised and updated by R.D. Crelinsten and D. Laberge-Altmejd. The remaining chapters in Part I were written by these two authors, the whole of Part I drawing on the proceedings of the conference itself. Part II, prepared by all three authors, contains edited versions of papers prepared for the conference.

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Part I:
Terrorism and the Criminal Justice System: Perspectives and Issues

Introduction to Part I

This section has a dual focus. It considers the impact of a certain criminal problem on the operations of the criminal justice system based on two sorts of questions: What effect has the problem had upon the system? What effect has the system had upon the problem? Both questions complement each other, since the answers to each one provide clues to the answers to the other. This first part is intended to provide the philosophical and methodological framework for approaching these two questions. It is not meant to be a review of current literature or a summary of current knowledge.

Chapter 1 looks at a problem that is prevalent in today's world and can be considered a criminal problem that has direct relevance to the criminal justice system. The problem is that of terrorism in all its manifest forms, including the uniquely modern one of skyjacking. Chapter 2 looks at the criminal justice system's response to the problem. The purpose of this is to determine to what extent the criminal justice system has dealt or could effectively deal with the particular criminal problem under study. Chapter 3 considers the possible side effects of the criminal justice system's response to terrorism, while the following two chapters focus more specifically on the unique problems political terrorism poses for the different components of the system. Chapter 6 examines those special difficulties stemming from the growing international character of political terrorism, and the final chapter attempts to highlight those areas of greatest heuristic value for future research.

The ultimate aim is to gain some perspective on the more general question of how appropriate and effective the criminal justice system is in dealing with *any* current criminal problem, particularly one with an international dimension such as is the case with terrorism. Thus, the specific problem of terrorism is being used as a context within which to attack the broader issues. It provides the framework upon which practical questions and realistic proposals can be based. The following chapters will delineate certain broad areas where fruitful questions may emerge and be pursued. They will also specify those areas where fruitful questions are *not* likely to emerge, either because they are sterile and unproductive areas or simply because they extend beyond the intended scope of the book.